CASE No. 1159.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,
vs.
THE DALLES MILITARY ROAD COMPANY et al. } No. 1159.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

This case relates to the road which was provided to be constructed from Dalles City to Fort Boise.

The bill of complaint was filed in August, 1889, and the action was brought by the Attorney-General in pursuance of the act of Congress passed March 2, 1889.

The questions arising in this case are similar to those which appear in No. 1073, the *United States* vs. *The California and Oregon Land Company*.

The court below in its opinion (p. 240) says:

> This case, in nearly all its essential features, presents precisely the same questions that were decided by this court in *United States* v. *California and Oregon Land Company* (49 Fed., R. 496); and upon the authority of that case the judgment of the circuit court should be affirmed.

Counsel for appellant believes that it will serve the convenience of all concerned to refer to the presentation of case No. 1073 for the general acts applicable in this case, and in relation to the principal features of case No. 1159.

PLEADINGS.

The bill of complaint sets forth that The Dalles Military Road Company and the Eastern Oregon Land Company and divers individuals named are the defendants.

It shows that the act of Congress granting the lands here in controversy passed February 25, 1867.

That said act provided that the lands granted should be exclusively applied to the construction of the road and to no other purpose.

It is also shown that the State act transferring the lands received was passed October 20, 1868.

That The Dalles Military Road Company is a private corporation under the laws of the State of Oregon, and that its proposed business was the location and construction of a clay road from Dalles City to a point on Snake River opposite Fort Boise.

The scope of the business of the corporation was afterwards extended so as to include the receiving of land grants and the selling and conveying of lands and other property.

It is represented in paragraph V that officers and others of The Dallas Military Company and other persons acting in their interests and in the interest of said company falsely and fraudulently represented to the governor of Oregon that the road had been constructed as by law required; they then and there, well knowing that said representations were false and that the road had not been constructed in any respect according to law, or at all; that such representations were made for the purpose of fraudulently procuring from the governor a certificate declaring that the said road had been constructed in accordance with the act of Congress and the State act referred to.

It is further alleged that Governor Woods issued a certificate which appears on pages 6 and 7 of the record.

The complaint further alleges that it was not and is not true that the company had at any time constructed or caused to be constructed a road upon any line of route within the limits of the grant of land refered to, and it is also alleged in relation thereto in paragraph VI, page 7, as follows:

> And this the said George L. Woods, governor aforesaid, then and there well knew, and that it was not and is not true that the said governor made a careful or any examination of any road constructed or owned by The Dalles Military Road Company.

By paragraph VII it is alleged that said certificate was procured by the company by and through the false and

fraudulent representations aforesaid in order to enable it falsely and fraudulently to obtain the lands lying within the limits of the land grant provided for in the legislation referred to, and that the acceptance of said pretended road by the governor was a fraud upon the United States of America.

The bill of complaint further alleges that the road never was built, graded, bridged, cleared, or constructed, in whole or in part, so as to permit transportation of any property, troops, or mails over the same, and was never maintained as a public highway.

It is further alleged that the lands never were applied exclusively, or at all, to the construction of the road or any part thereof, or the construction of bridges, or the establishment of ferries along the line of the road, and it is also alleged that the lands granted had not been disposed of for the purpose expressed in the granting act.

The bill refers to the act of June, 1874, and to the patents given by the United States to said Military Road Company, and to the deeds conveying portions of said lands to the defendants respectively.

Paragraph XV shows that the maps or plats referred to in the governor's certificate showed the line of the pretended road to be 357 miles, which would make the grant of lands covered by the act of Congress referred to, in the aggregate, 685,440 acres, of which 558,529.77 acres are not yet patented to said Road Company, and the company inequitably claims the right to have a patent issued therefor.

Paragraph XVI alleges that the several defendants at the time of the delivery of the deeds made had full knowledge that the road had not been constructed and maintained as required by law, and well knew that the statements made in the certificate of the governor of Oregon were false, that the governor did not examine the road, and that said certificate was procured by false and fraudulent representations, and that the patent was found to be issued upon said false and fraudulently procured certificates.

The prayer of the complaint asks that the patents described in the bill and the certificates set forth and the deeds referred to be declared fraudulent and void, and that the United States have other and further relief, etc.

The exhibits attached to the bill set forth a copy of the patent to the road company and copies of deeds to individual defendants, and a copy of the deed to the Eastern Oregon Land Company.

Several of the individual defendants, together with the Eastern Oregon Land Company, October 17, 1889, filed a joint and several plea and accompanying answer to the bill of complaint (p. 61).

The defendant, The Dalles Military Road Company, and the president and the secretary thereof, on the 25th day of said month filed their answer, which is set forth (pp. 75 to 85).

Upon the trial had in February, 1890, a decree was entered dismissing the bill.

Appeal was taken to the Supreme Court of the United States (140 U. S., 599) and the case was sent back for trial.

After the filing of the mandate of this court a replication of the United States was filed to the answers and pleas of the defendants. This replication appears on page 103 of the record and is in terms a replication to the answer and pleas of the defendants named, including, it is submitted, The Dalles Military Road Company. The date of the filing of this replication is June 13, 1891. On page 111 is set forth an amended plea by the Eastern Oregon Land Company and others, and on page 117 appears the amended answer of the same defendants. It does not appear that The Dalles Military Road Company joined in this plea and answer.

REPLICATION.

November 14, 1891, the United States filed its replication to the joint and several amended pleas and amended answer of the said Eastern Oregon Land Company and others referred to (p. 127).

The several allegations, matters, and things set forth in the respective pleas, answers, and replications hereinbefore referred to are substantially similar, and are the same in substance and effect as those which appear in the pleas, answers, and replications appearing in case No. 1073, *The United States* vs. *The California and Oregon Land Company*.

It will be noted, however, that the court below, November 27, 1891, on the motion of the counsel for that company, dismissed the bill of complaint against The Dalles Military Road Company "for want of replication to the answer of said defendant" (p. 131).

Afterwards (p. 132) motion was made on behalf of the complainant to set aside the order dismissing the suit as to The Dalles Military Road Company, James K. Kelly and C. M. Thornbury, and for leave to file a replication to the answer of said defendants, if the replication already filed is held by the court not to apply as a replication to said answer.

On December 7, 1891 (pp. 134 and 135), the court denied said motion.

LEGISLATION RELATING TO THE DALLES MILITARY ROAD COMPANY.

February 25, 1867, the following law was enacted (14 Stat., 409):

> CHAP. LXXVII.—An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on the Snake River.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia River, by way of Camp Watson, Cañon City, and Mormon or Humboldt Basin, to a point on Snake River opposite Fort Boise, in Idaho Territory, alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road: *Provided*, That the lands hereby granted shall be exclusively applied to the construction of said road and to no other purpose, and shall be disposed of only as the work progresses: *And provided further*, That any and all lands heretofore reserved to the United States, or otherwise appropriated by act

of Congress or other competent authority, be, and the same are hereby, reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way to the width of one hundred feet is granted: *And provided further*, That the grant hereby made shall not embrace any mineral lands of the United States.

SEC. 2. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of by the legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the Government of the United States, free from tolls or other charges upon the transportation of any property, troops, or mails of the United States.

SEC. 3. *And be it further enacted*, That said road shall be constructed with such width, gradation, and bridges as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

SEC. 4. *And be it further enacted*, That the State of Oregon is authorized to locate and use in the construction of said road an additional amount of public lands not previously reserved to the United States nor otherwise disposed of, and not exceeding ten miles in distance from it, equal to the amount reserved from the operation of this act in the first section of the same, to be selected in alternate odd sections as provided in section first of this act.

SEC. 5. *And be it further enacted*, That lands hereby granted to said State shall be disposed of only in the following manner, that is to say, when the governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed then a quantity of the land hereby

granted, not to exceed thirty sections, may be sold, and so on from time to time until said road shall be completed; and if said road is not completed within five years no further sales shall be made and the lands remaining unsold shall revert to the United States.

SEC. 6. *And be it further enacted*, That the United States surveyor-general for the district of Oregon shall cause said lands so granted to be surveyed at the earliest practicable period after said State shall have enacted the necessary legislation to carry this act into effect.

Approved February 25, 1867.

The following is the enactment of the State of Oregon passed October 20, 1868 (Laws of Oregon, 1868, p. 3):

AN ACT donating certain lands to Dalles Military Road Company.

Whereas at the second session of the Thirty-ninth Congress that body passed an act entitled "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on the Snake River," approved February 25, 1867, as follows:

Be it enacted by the legislative assembly of the State of Oregon:

SECTION 1. That there is hereby granted to The Dalles Military Road Company, incorporated, as it appears by the articles of incorporation filed in the office of the secretary of state on the 30th day of March, 1868, all lands, right of way, rights, privileges, and immunities heretofore granted or pledged to this State by the act of Congress in this act heretofore recited for the purpose of aiding said company

in constructing the road mentioned and described in said act of Congress upon the conditions and limitations therein prescribed.

SEC. 2. There is hereby granted and pledged to said The Dalles Military Road Company all moneys, lands, rights, privileges, and immunities which may be hereafter granted to this State to aid in the construction of such road for the purposes and upon the conditions mentioned in said act of Congress, or which may be mentioned in any further grants of money or lands to aid in constructing said road.

SEC. 3. The said The Dalles Military Road Company is hereby authorized to locate the lands mentioned in the fourth section of the above-recited act, subject to the approval of the Governor.

Approved October 20, 1868.

ASSIGNMENTS OF ERROR.

(1) The court erred in decreeing the dismissal of the bill of complaint.

(2) The court erred in sustaining the exception to the third paragraph of the bill of complaint after the word "effect" in the third line of said paragraph.

(3) The court erred in sustaining the second exception to the bill of complaint, the same being an exception to all of paragraph VIII after the word "same" therein.

(4) The court erred in deciding and holding that the matter set forth in the pleas and answers, respectively, authorized a decree dismissing the bill.

(5) The court erred in dismissing the bill as to the defendant, The Dalles Military Road Company, upon the alleged ground that the complainant had not filed a reply to the answer filed by said defendant.

(6) The court erred in holding the governor's certificate to be sufficient and of binding effect.

(7) The court erred in holding that the State act of October 14, 1862, was without effect and inapplicable to this road.

(8) The court erred in holding that the several defendants were not bound by the conditions of the national and State acts, respectively.

(9) The decree and the findings therein set forth are each, respectively, erroneous, inconsistent with the pleadings, against the evidence, and contrary to law.

(10) The court erred in sustaining the exceptions of the defendants to the testimony offered by complainant after the defendants had taken their testimony and rested upon the issues arising upon the plea and answer filed herein, and in sustaining said defendants' objection to the following question propounded to witness A. D. Edgar: "State fully and at length all you know as to whether or not the wagon road, known as The Dalles Military Road, referred to in the bill in this suit, was ever built or constructed, and describe fully all that was done by said company in reference thereto, and state fully also all that you know in reference to the way that the certificates of the governor of Oregon that said road or portions thereof had been built, were obtained."

(11) The court erred in making and entering the decree as made and entered herein on the 27th day of November, 1891, dismissing the bill as to the defendant, The Dalles Military Road Company, for want of replication to the answer of said defendant.

(12) The court erred in overruling and denying the motion of the complainant to set aside and vacate said decree of November 27, 1891, dismissing the bill as to the defendant, The Dalles Military Road Company, as having been entered by inadvertence, and for leave to file a replication.

(13) The court erred in making the said decree, made and entered herein on the 7th day of December, 1891, sustaining the plea of said defendants, D V. B. Henarie, Eleanor Martin, P. J. Martin, and the Eastern Oregon Land Company, and in dismissing the bill of complaint as to said defendants.

(14) The finding of the court in said decree, that the certificate of the governor of the State of Oregon declaring the road mentioned in the bill to have been duly constructed, was truthfully made, without any fraud or misrepresentation on the part of anyone, is contrary to the admissions made in pleas and answers of the said defendants, and is against the evidence, and is contrary to law.

(16) The finding of the court in said decree, that the said defendants are purchasers of the land described in the said bill from The Dalles Military Road Company in good faith, and for a valuable consideration, without notice of any fraud or misrepresentation on the part of The Dalles Military Road Company, or anyone else, is against the evidence, and is contrary to law.

POINTS: No. 1159.

A.

THE COURT ERRED IN PROHIBITING COMPLAINANT FROM SHOWING THE NONCONSTRUCTION OF THE ROAD; AND ALSO ERRED IN PROHIBITING TESTIMONY SHOWING THAT THE CERTIFICATE OF THE GOVERNOR THAT THE ROAD WAS BUILT AND CONSTRUCTED, WAS OBTAINED BY MISREPRESENTATION AS CHARGED IN THE BILL.

October 26, 1891, and after the taking of the testimony offered by the defendants in this case, the parties appeared before the examiner, and counsel for complainant offered to call witnesses to show that The Dalles Military Road was never built as required by the act of Congress, and that the certificate of the governor that it was built and constructed was obtained by misreprsentation.

Counsel for defendants made objection to the receiving of the testimony offered. A witness was then called and sworn on behalf of the complainant, and was interrogated as to whether the road was ever built or constructed, and also as to the way the certificate of the governor of Oregon that said roads or portions thereof had been built, was obtained.

Counsel for defendants objected to each question, and the examiner certified the question involved to the court for decision (pp. 128 to 130).

November 25, 1891, the court ordered and adjudged that the objection made by the defendant to the receiving of the testimony offered be sustained (pp. 131 and 229 to 231).

On December 7, 1891, the decree entered upon the second trial was filed by the court (p. 134).

This decree is signed by Deady, J., and recites that the cause was heard upon the bill, the amended pleas and answer of defendants Henarie, Martin, Martin, and the Eastern Oregon Land Company, the replication thereto, and the testimony and exhibits.

It states that argument had been made, and continues:

> On consideration whereof *the court finds that the certificate of the governor of Oregon declaring the road mentioned in the bill to have been duly constructed, was truthfully made, without fraud or misrepresentations on the part of anyone*; and that said defendants are purchasers of the lands described in said bill from The Dalles Military Road Company, in good faith, for a valuable consideration, and without notice of any fraud or misrepresentation on the part of said Dalles Military Road Company, or any one else.
>
> *It is therefore* ordered, adjudged, and decreed that said pleas of said defendants be, and the same are hereby sustained, and the said bill of complaint be, and the same is hereby dismissed, as to said defendants, etc.

The plea of said defendants sets forth (p. 112) the certificate of Governor Wood, before referred to, upon which defendants claimed that the land passed under the granting acts.

This certificate is here introduced by the preliminary statement, which is an allegation of the plea, "that George L. Woods, then governor of Oregon, without any false or fraudulent representations having at any time been made to him by the officers, stockholders, or agents of The Dalles Military Road Company, or any other person or persons in its or their interest, and without any one or some of them having falsely or fraudulently induced him to certify that the road of said company was constructed in accordance with law on the 23d day of June, 1869, issued" the certificate.

It is respectfully submitted that the proceedings set forth show that the court erred in the exclusion of testimony showing that the road had never been constructed; and also seriously and gravely erred in holding that the complainant should be restrained and precluded from showing that the governor's certificate was obtained by misrepresentation as in the bill charged.

It also erred in granting a decree based upon the finding that the certificate "was truthfully made, and without fraud," when it had precluded and prohibited the complainant from proving that such certificate was neither true nor honest.

B.

THE COURT ERRED IN DISMISSING THE BILL OF COMPLAINT AS TO THE DEFENDANT, THE DALLES MILITARY ROAD COMPANY.

The dismissal referred to was made upon the suggested ground that no reply had been filed to the answer of The Dalles Military Road Company.

It will not be forgotten that this case was sent back to the court below for the purpose of permitting the complainant to reply to the pleas and answers filed and for the purpose of testing by evidence before the court the facts involved in the several issues. By this action of the court below dangerous legal complication may ensue from leaving out of the case the original grantee of the lands in controversy and the active participant in the proceedings by which the governor's certificate was obtained.

The circuit court fails to approve of this dismissal, and says (p. 251) that:

> In view of these conclusions it is immaterial whether the court erred in refusing to allow the complainant to reply to the answer of The Dalles Military Road Company, or in dismissing the bill as to it.

This court has said that Congress intended a full legal investigation of the facts, and did not intend that the important interests involved should be determined upon the untested allegations of the defendants (632).

The mandate of the Supreme Court of the United States was filed in the circuit court for the ninth judicial circuit, district of Oregon, June 8, 1891 (p. 99).

The answer of The Dalles Military Road Company and James K. Kelly and C. M. Thornbury was filed October 25, 1889 (p. 79). The joint and several plea of Henarie, Martin, Martin, and the Eastern Oregon Company to the bill of complaint was filed October 17, 1889 (p. 61), and the answer of the same parties was filed on the same day (p. 67).

Amended plea of the same defendants was filed November 11, 1891 (p. 111), and the amended answer of these defendants was filed upon the same day (p. 117).

June 13, 1891, a general replication was filed by the United States to the answer and pleas of the defendants.

The title of the plea mentions "The Dalles Military Road Company" and the Eastern Oregon Land Company and the individual defendants named in the bill of complaint (p. 103).

The first sentence of the replication reads as follows:

> The replication of the United States, plaintiff, to the answer and pleas of the above-named defendants.

The replication is in the usual form.

November 14, 1891, the complainant filed another replication, which is in terms a replication to the joint and several amended pleas and amended answer accompanying the same of the defendants, Henarie, Martin, Martin, and the Eastern Oregon Land Company (p. 127).

On November 27, 1891, The Dalles Military Road Company, by its counsel, moved the court to dismiss the bill as to it, and the proceedings relating thereto appear in the record.

Counsel moves the court—

> That the bill herein be dismissed as to said defendant for want of replication to the answer of said defendant. It is therefore ordered and adjudged that the bill of complaint herein be, and the same is hereby, dismissed as to said defendant, The Dalles Military Road Company; whereupon, this cause comes on to be heard upon the pleas and answers of the defend-

ants Eleanor Martin, P. J. Martin, D. V. B. Henarie, and the Eastern Oregon Land Company, the replication thereto and the testimony (p. 131).

On December 2 counsel for the complainant moved the court to vacate and set aside the order of dismissal above referred to, as having been entered herein by inadvertence, and for leave to file a replication to the answer of the said defendants, "The Dalles Military Road Company, James K. Kelly, and C. N. Thornbury, if replication already filed is held by the court not to apply as a replication to said answer" (p. 132).

On the same day the motion was set for hearing (p. 133), and December 7, 1891, the court denied the motion (p. 135, top).

It is respectfully submitted that this action of the court dismissing the bill of complaint as to the defendant named was without justification and was against the legal rights of the complainant.

It is submitted:

(1) That the replication filed June 13, 1891, was sufficient in the premises.

(2) That if there were a reasonable question as to whether that reply was sufficient, the action of the court in dismissing the complaint against this important defendant was harsh, uncalled for and contrary to equity.

(3) That the denial of the right of reply to the complainant when that right was requested upon motion was inequitable and was contrary to the intent of Congress as shown in the act of 1889, and was contrary to the direction and effect of the decision of this court in the Wagon Road cases as set forth in 140th United States.

These rulings of the court aided and assisted the defendant company to escape and evade the test of an actual trial before a judicial tribunal of the questions which Congress by the act of 1889 commanded to be tried.

C.

REFERENCE TO BRIEF IN CASE NO. 1073.

As the questions involved in this case which are not now expressly presented are substantially the same as those set forth at length in the connected brief of the California and Oregon Land Company, No. 1073, permission is respectfully asked of the court to refer to the points and presentation appearing in such brief which is herewith printed. It will be remembered that these two cases, with the other Oregon Wagon Road cases, were argued and submitted to this court together upon the former hearing of the Wagon Road cases, the decision as to which is set forth in the 140th United States.

With the view of saving time, and of serving the convenience of all concerned in the argument and disposition of these cases, counsel for the appellant begs leave to argue and to submit them together, leaving counsel representing the respective appellees to pursue such course in their argument and submission as they shall deem proper.

D.

It is respectfully submitted that the decree entered in case No. 1159 should be reversed.

A. X. PARKER,
Assistant Attorney-General.